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Supreme Court, U.S.
FILED
OCT 15 1996

No. 96-377

IN THE
# Supreme Court of the United States
October Term, 1996

SARALEE BRAUN, As Administrator of The Estate of Norman Braun, Deceased, and Individually,
*Petitioner,*

*v.*

LORILLARD, INC. and HOLLINGSWORTH & VOSE COMPANY,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## RESPONDENT HOLLINGSWORTH & VOSE COMPANY'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1) Whether plaintiff's destructive testing of lung tissue samples constituted exceptional circumstances under Fed. R. Civ. P. 26(b)(4)(B) where plaintiff avoided summary judgment by arguing that defendants could not prove the absence of crocidolite asbestos in the decedent's lung by testing their allocated tissue samples and where the district court found, based on the testimony of plaintiff's expert witness, that the tissue samples were unique.

2) Whether the Seventh Circuit properly applied *Daubert* by insisting that plaintiff's retained expert, who had no experience with, or knowledge of, fiber burden analysis of lung tissue, ground his departure from the generally accepted methodologies for conducting fiber burden analysis of lung tissue in "demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry."

3) Whether the district court's decision refusing to allow petitioner's causation expert to repeat on redirect examination the hearsay testimony of a non-witness constituted harmless error or no error.

## LIST OF PARTIES

Plaintiff is Saralee Braun, as administrator of the Estate of Norman Braun, and individually. Defendants are Hollingsworth & Vose Company and Lorillard, Inc. Hollingsworth & Vose Company's non-wholly owned subsidiary corporations are Neponset River Company and Hovomex, S.A. Hollingsworth & Vose Company does not have a parent corporation.

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## STATEMENT OF THE CASE

On February 15, 1994, this civil action was filed by Norman Braun in the United States District Court for the Northern District of Illinois against Lorillard, Inc. and Hollingsworth & Vose Company. (App. Docket No. 1.) Mr. Braun alleged that he had developed a form of cancer known as mesothelioma from smoking Kent cigarettes with an asbestos-containing filter. (*Id.*)

Between 1952 and 1956, P. Lorillard, a predecessor of Lorillard, manufactured Kent cigarettes with an asbestos-containing filter. (App. Docket No. 192.) The filter was made from filter material manufactured by H&V Specialties Co., Inc., a former subsidiary of Hollingsworth & Vose. (*Id.*) This filter paper contained cotton, crepe paper, cellulose acetate, and crocidolite asbestos. (*Id.*)

Mr. Braun died on February 27, 1995, and thereafter his wife, Saralee Braun, filed an Amended Complaint seeking recovery for damages resulting from the death of Mr. Braun. (App. Docket No. 87.) After a three-week trial, the jury returned a verdict for defendants. (App. Docket No. 217.) Plaintiff appealed the judgment to the Seventh Circuit Court of Appeals which, on May 17, 1996, affirmed the judgment in *Braun* v. *Lorillard, Inc.*, 84 F.3d 230 (7th Cir. 1996.) On June 14, 1996, the Seventh Circuit denied plaintiff's petition for rehearing. Plaintiff's petition to this Court was filed on September 11, 1996.

## STATEMENT OF FACTS

### 1. Disclosure of Plaintiff's Destructive Testing Results Under Rule 26(b)(4)(B)

On March 7, 1995, plaintiff's lawyers announced that they intended to conduct fiber burden analysis of lung tissue taken from the decedent during autopsy. (App. Docket No. 189.) When plaintiff's lawyers refused to provide information about

the nature of the testing, defendants requested an order prohibiting any *destructive* testing pending receipt of further information about the contemplated tests. (*Id.*) Plaintiff argued to the district court that the testing should not be stayed, and that no further information need be provided because plaintiff would make half of the decedent's lung tissue available to defendants and because, plaintiff claimed, lung tissue is "fungible." (App. Docket No. 77 at 4.) Unilateral testing could therefore be conducted by the parties and defendants' rights would be protected, according to plaintiff, because the lung tissue made available to defendants would provide them with the same information as to the mineral content of the lung as would the tissue tested by plaintiff. (*Id.*) Between March 7, 1995 and June 27, 1995, when the district court entered its Order Regarding Tissue Testing Contemplated By Plaintiff, (App. Docket No. 99.), lung tissue testing was the subject of at least five hearings held by the district court and twelve filings received by the district court.

After the entry of the district court's Order, defendants received eight lung tissue specimens which they sent to Dr. Frederick Pooley, a Professor in Mineral's Engineering in the School of Engineering at the University of Wales, College of Cardiff. (App. Docket No. 163.) Dr. Pooley is an acknowledged expert in the field of fiber burden analysis of lung tissue. In accordance with the protocol set forth in the district court's Order, Dr. Pooley conducted a quantitative and qualitative analysis of the mineral content of the eight lung tissue specimens. (*Id.*) The tests detected the presence of various materials, including chrysotile asbestos, tremolite asbestos, and amosite asbestos. (Tr. 2641.) However, no crocidolite asbestos (the type of asbestos used in the Kent filter) was found in Mr. Braun's lung tissue. (Tr. 2634.)

Plaintiff also had a fiber burden analysis done of Mr. Braun's lung tissue. Dr. Frank Carone, the pathologist who conducted the decedent's autopsy and prepared the tissue specimens, sent

eight samples to Dr. Victor L. Roggli, Department of Pathology, Duke University, for fiber burden analysis. (Plaintiff-Appellant's Appendix (hereinafter "A.") at A.22.) Dr. Roggli is among the community of scientists who have published in the field of fiber burden analysis of lung tissue. Dr. Roggli found chrysotile, amosite, and tremolite asbestos in Mr. Braun's lung tissue, but did not find any crocidolite asbestos. (Tr. 407.) Dr. Roggli prepared a written report of his findings and mailed the report to Dr. Carone. (A.17.) However, plaintiff's counsel intervened and instructed Dr. Carone not to read the Roggli report and to forward the envelope containing the report to plaintiff's lawyers. (*Id.*)

Thereafter, plaintiff's lawyers had a second fiber burden analysis of Mr. Braun's lung tissue performed by Materials Analytical Services, Inc. ("MAS") (Tr. 841.) MAS analyzed Mr. Braun's lung tissue and also found no crocidolite asbestos. (*Id.*) MAS is the laboratory whose president, Dr. William Longo, had already been disclosed by plaintiff as an expert witness who would (and did) opine at trial on whether vintage Kents released crocidolite asbestos fibers when smoked.

Despite defendants' requests for production of the results of plaintiff's destructive testing of the decedent's lung tissue, plaintiff refused production, asserting a so-called "consulting expert privilege" under Fed. R. Civ. P. 26(b)(4)(B). (App. Docket No. 202.) Moreover, after receiving Dr. Pooley's negative test results, plaintiff's lawyers no longer argued that lung tissue is fungible. They disowned their prior argument that "[lung] tissue, as far as I know, is lung tissue," (Hollingsworth & Vose Company's Appendix at 2A), and asserted that lung tissue is not homogeneous and that the samples tested by defendants were not representative of Mr. Braun's lung tissue as a whole. Consequently, in response to defendants' summary judgment motion, plaintiff's lawyers argued: "Failing to find a particular mineral in the samples examined, cannot scientifi-

cally establish that the mineral does not exist in the rest of the material that was not examined." (App. Docket No. 194.)

Defendants subsequently filed a motion to compel the production of the results of the destructive testing. (App. Docket No. 201.) The district court granted defendants' motion after extensive briefing and oral argument by the parties. The district court held:

> [W]e conclude that since portions of the lung vary in density and the lung is not a homogeneous tissue, in the instant case, there is a showing of exceptional circumstances. Asbestos is not uniformly dispersed throughout the lung; each sample is unique thereby making each analysis unique.

(Petitioner's Appendix (hereinafter "Pet. App.") at A-19-20.) In affirming the district court's decision, the Seventh Circuit noted plaintiff's strategic change of position and the resulting prejudice to defendants. (Pet. App. at A-8.) The circuit court held:

> The only way the defense could find out whether there were crocidolite asbestos fibers in the tissues that the plaintiff's experts had tested was to get the test results. The condition for the exception in Rule 26(b)(4)(B) thus was satisfied.

(*Id.*)

**2. Dr. Schwartz**

After receiving unfavorable test results from Dr. Roggli and MAS, plaintiff's lawyers then approached Dr. David Schwartz and asked him to conduct a third analysis of Mr. Braun's lung tissue. (Tr. 1017.) Dr. Schwartz is the president of an environ-

mental testing laboratory that analyzes building materials, underground storage tanks, soils, and water for the presence of asbestos and other fibers. (Tr. 1003-04.)

Plaintiff's counsel specifically asked Dr. Schwartz to disregard routine methodology in analyzing Mr. Braun's lung tissue. (Tr. 1053.) Dr. Schwartz had his assistant subject plaintiff's tissue samples to a high temperature ashing process that his laboratory used to analyze building materials such as ceiling tiles or asbestos insulation. (*Id.*) This methodology involves incinerating the material so as to leave behind the inorganic residue for examination. (Tr. 1017.) To eliminate the biological tissue, acid is also used either in combination or sequentially with the application of high temperature. (Tr. 1055.)

The high temperature ashing methodology used by Dr. Schwartz can affect the chemistry of the inorganic residue, including any asbestos fibers. (*Id.*) Moreover, according to Dr. Schwartz, this methodology should not be used if the material being prepared contains a small number of fibers. (*Id.*) (Plaintiff's counsel represented to the district court that Dr. Schwartz's assistant found two crocidolite asbestos fibers in one sample of Mr. Braun's lung tissue. (Tr. 1032.)) Dr. Schwartz, who was unavailable at the time, did not analyze Mr. Braun's lung tissue. (Tr. 1051.) The actual preparation and analysis was performed by Dr. Schwartz's assistant, Mr. Lov. (Tr. 1018.) Mr. Lov was not a witness at trial.

Neither Dr. Schwartz nor his assistant had ever performed a fiber burden analysis of lung tissue. (Tr. 1051.) Moreover, Dr. Schwartz had no independent knowledge regarding this specialized procedure. Dr. Schwartz testified that he could not identify any articles in the scientific literature pertaining to fiber burden analysis of lung tissue. (Tr. 1021.) Dr. Schwartz was not able to name any researcher who has published in this area. (*Id.*) Prior to instructing his assistant to proceed, Dr. Schwartz had not read the relevant scientific literature, (Tr. 1052), and did not consult with anyone in the field with experi-

ience in fiber burden analysis of lung tissue. (*Id.*) Dr. Schwartz was aware of the existence of published instructions specifically for fiber burden analysis of lung tissue, and he knew how to obtain them. (*Id.*) Dr. Schwartz admitted that he did not know that bleach digestion or low temperature plasma ashing are methods customarily used for preparing lung tissue for fiber burden analysis. (Tr. 1065-66.) Dr. Schwartz further testified that he did not know whether the high temperature ashing technique he employed is a customary method utilized by experts who do fiber burden analysis of lung tissue. (Tr. 1066.)

Dr. Schwartz opined that there were crocidolite fibers in Mr. Braun's lung tissue. (Tr. 1031.) Following voir dire at trial, the district court found that Dr. Schwartz knew "absolutely nothing about analyzing lung tissue and [for?] asbestos fibers." (Tr. 1073.) The court also found that Dr. Schwartz made no connection between the methodology he employed and fiber burden analysis of lung tissue. (Tr. 1037.) The trial judge struck Dr. Schwartz's opinion that Mr. Braun's lung tissue contained crocidolite asbestos. (Tr. 1068.) The Seventh Circuit affirmed the district court's decision, stating among other things:

> The fact that the plaintiff's lawyer turned to this nonexpert, having already consulted experts without obtaining any useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

(Pet. App. at A-6.)

**3. Dr. Cugell**

Dr. Cugell, a pulmonologist who had not treated Mr. Braun, opined for plaintiff that Mr. Braun's mesothelioma was caused by exposure to crocidolite asbestos from smoking Kent cigarettes. (Tr. 1327.) Dr. Cugell testified on direct examination that he based his testimony in part upon statements received from Dr. Andrew Churg. (Tr. 1325-26.) Specifically, Dr. Cugell allegedly relied upon Dr. Churg's statement rendered while testifying in another lawsuit, *Ierardi* v. *Lorillard, Inc.*, Civ. A. No. 90-7049 (E.D.Pa. 1991), that smoking Kent cigarettes with the asbestos-containing filter could cause mesothelioma. (Tr. 1430-31.) On cross-examination of Dr. Cugell, defendants utilized Dr. Churg's writings to establish that the absence of crocidolite asbestos in Mr. Braun's lung tissue indicated that Mr. Braun's mesothelioma was not caused by his exposure to crocidolite asbestos. (Tr. 1397-99, 1401-03.)

Plaintiff attempted to elicit Dr. Churg's specific statement from Dr. Cugell on redirect examination. (Tr. 1430.) During voir dire, Dr. Cugell testified that physicians in the practice of medicine do not rely upon the trial testimony of other physicians in the diagnosis of patients. (Tr. 1439.) The district court found that Dr. Churg's statement constituted inadmissible hearsay and further found that its admission would cause substantial prejudice to the defendants. (Tr. 1444, 1448.) The district court allowed Dr. Cugell to testify that he relied on statements received from Dr. Churg as a basis for his opinion, but refused to allow Dr. Cugell to recite Dr. Churg's prior trial testimony. (Tr. 1444.)

The Seventh Circuit found that defendants' cross-examination of Dr. Cugell was misleading because it allegedly conveyed the impression that Dr. Churg believed that the Kent filter could not cause mesothelioma. (Pet. App. at A-13.) To rebut this inference, the court held that it was proper to demonstrate on redirect examination the true nature of Dr. Churg's

opinion. (*Id.*) However, the Seventh Circuit held that any error committed by the district court was harmless. (*Id.*) The court alternatively held that the district court cured any prejudice to plaintiff by allowing Dr. Cugell to testify on redirect examination that he based his opinion in part on statements made by Dr. Churg:

> To permit Dr. Cugell to have repeated Dr. Churg's testimony might well have been overkill, without a collateral inquiry, which might have confused the jury and would certainly have protracted the trial, into the scientific basis of that testimony.

(Pet. App. at A-14.) The Seventh Circuit therefore affirmed the district court's decision.

## SUMMARY OF THE ARGUMENT

Each of the Questions Presented by plaintiff in her petition for writ of certiorari challenges a discovery or an evidentiary ruling of the district court which was affirmed by the Seventh Circuit. Despite the attempts of plaintiff's lawyers to make it look otherwise, plaintiff's actual grievance is the application by the Seventh Circuit of a properly stated rule of law to the particular facts of this case. This does not provide an appropriate basis for this Court's review and certiorari should be denied.

Plaintiff's entire position with regard to the discovery of the results of the destructive testing conducted by her retained experts is marked by inconsistency and a lack of candor. To secure independent destructive testing of the decedent's lung tissue, plaintiff's lawyers argued to the district court that because lung tissue is fungible, the tissue samples allocated to the parties were identical. According to plaintiff's lawyers, because the parties had access to the same information, exceptional circumstances did not exist under Fed. R. Civ. P. 26(b)(4)(B) and defendants were not entitled to discover plain-

tiff's testing results. However, when defendants' expert found no crocidolite asbestos in defendants' tissue samples, plaintiff's lawyers altered their position and argued that defendants' test results were inconclusive because the tissue samples tested by defendants were not representative of the entire lung because lung tissue is not fungible. The district court accepted plaintiff's argument and concluded that the lung tissue samples were unique. The district court further concluded, because it was impossible for defendants to determine whether or not there was crocidolite asbestos in the tissue tested (and destroyed) by plaintiff's experts, exceptional circumstances were present within the meaning of Rule 26(b)(4)(B) warranting the disclosure of plaintiff's destructive testing results. The district court's decision, as affirmed by the Seventh Circuit, is a direct application of Rule 26(b)(4)(B) to the particular facts of this case.

The courts below properly followed the framework set forth by this Court in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed. 2d 469 (1993), in scrutinizing the principles and methodology underlying Dr. Schwartz's opinion. Dr. Schwartz possessed no knowledge or experience pertaining to the preparation and analysis of lung tissue for the presence of asbestos fibers and he made no attempt to familiarize himself with this highly specialized scientific field. Without any background knowledge, inquiry, or preparation, Dr. Schwartz decided to utilize a methodology at the request of plaintiff's lawyers which had never been used before with lung tissue. Because Dr. Schwartz's testimony was not derived by the scientific method, his speculation that the decedent's lung tissue contained crocidolite asbestos was properly excluded by the district court.

The Seventh Circuit properly held that the district court's refusal to allow Dr. Cugell, plaintiff's causation expert, to restate the precise statement made by Dr. Churg upon which he allegedly relied was harmless error. Moreover, the Seventh Circuit correctly held in the alternative that the district court

cured any prejudice to plaintiff arising from defendants' cross examination of Dr. Cugell by allowing Dr. Cugell to testify on redirect examination that he relied in part on statements received from Dr. Churg. However, because of the alternative nature of the Seventh Circuit's ruling, this Court will not reach the question presented by plaintiff.

## REASONS FOR DENYING THE WRIT

I. THE DISTRICT COURT DID NOT ERR IN ITS FINDING OF "EXCEPTIONAL CIRCUMSTANCES" UNDER FED. R. CIV. P. 26(b)(4)(B).

This issue arose when plaintiff's lawyers announced that they intended to do a fiber burden analysis of tissue taken from the decedent's lung. When plaintiff's lawyers refused to provide defendants with information about the nature of the testing, defendants filed with the district court a motion to stay testing. (App. Docket No. 78.) Defendants emphasized that any known test of lung tissue required the destruction of the lung tissue such that the test could not be duplicated with the same lung tissue. Defendants pointed out that this was a classic "exceptional circumstance" under Fed. R. Civ. P. 26(b)(4)(B). *See, e.g.*, Federal Judicial Center, *Reference Manual on Scientific Evidence*, 25 ("Exceptional circumstances may arise . . . where an expert, for example, has conducted destructive tests relevant to the issues but incapable of being repeated. . . .").

When courts permit parties to conduct destructive testing, they require various safeguards to protect the opposing party's interests in unique evidence. Such safeguards typically include provision for the opposing party's access to the test results and procedures. In *Ostrander* v. *Cone Mills, Inc.*, 119 F.R.D. 417 (D. Minn. 1988), for example, the court permitted the defendants to conduct destructive flammability tests on certain fabric samples which were critical to a product liability case.

The court required that certain procedures be followed, including allowing the plaintiffs to depose the defendants' experts and any other persons substantially involved in the testing. *Id.* at 421; *see also Spell* v. *Kendall-Futuro Co.*, 155 F.R.D. 587, 588 (E.D. Tex. 1994) (court granted leave to depose expert who conducted destructive tests). In ordering discovery of the results of destructive testing in *Cameron* v. *District Court*, 565 P.2d 925 (Colo. 1977), the court explained that the overriding concern in destructive testing cases is "the formulation of methods for providing full discovery while preserving the rights of all parties to the litigation." *Id.* at 931 (citations omitted).

In constructing safeguards to protect the interests of all parties, courts are generally in accord with the *Cameron* court's decision to grant defendants' broad access to the plaintiff's testing. *See Coates* v. *AC&S, Inc.*, 133 F.R.D. 109, 111 (E.D. La. 1990); *Castro* v. *Alden Leeds, Inc.*, 497 N.Y.S.2d 402 (1986) (ordering disclosure of plaintiff's test results and factual data); *Pizza Hut, Inc.* v. *Midwest Mech., Inc.*, 1988 U.S. Dist. LEXIS 890 (N.D. Ill. Jan. 29, 1988) (permitting testing by defendants conditioned on parties agreeing on expert to conduct test and permitting plaintiff to videotape the testing process); *Dina* v. *Lutheran Medical Center*, 548 N.Y.S.2d 541 (1989) (permitting defendants to have representatives present at destructive testing performed by plaintiff); *Sarver* v. *Barrett Ace Hardware, Inc.*, 349 N.E.2d 28 (Ill. 1976); *Edwardes* v. *Southampton Hospital Assoc.*, 278 N.Y.S.2d 283 (1967) (ordering that test be performed in presence of all parties and the circulation of one expert opinion); *Foster-Lipkins Corp.* v. *Suburban Propane Gas Corp.*, 339 N.Y.S.2d 581 (1973) (permitting plaintiff to have representative present at testing and to examine and photograph test samples); *Petruk* v. *South Ferry Realty Co.*, 157 N.Y.S.2d 249 (1956) (ordering that parties agree on expert and that test results be furnished to both parties).

In order to avoid a finding of exceptional circumstances which would require that plaintiff give defendants' broad access to her test results, plaintiff's lawyers argued that they were not doing destructive testing which could not be repeated. (App. Docket No. 95.) Plaintiff's lawyers argued explicitly that lung tissue is uniform. At the district court hearing on March 16, 1994, plaintiff's lawyer claimed, "[lung] tissue, as far as I know, is lung tissue. . . . This is analogous to having a bunch of blood samples and potentially having each side test half of the samples if they wish to do so." (Hollingsworth & Vose Company's Appendix at 2A.) In a written filing with the district court, plaintiff's lawyers characterized lung tissue as "fungible." (App. Docket No. 95.) Thus, they argued that if half of the lung tissue were given to defendants, defendants could perform whatever tests they wished and learn the same thing that plaintiff would learn through her tests, namely, the mineral content of the lung tissue destroyed by plaintiff.

Subsequently, plaintiff's lawyers insisted that defendants would have an equal opportunity to determine what plaintiff found in her tests because each party would be given a "representative sample" and the "representative samples" would be equivalent. Plaintiff's lawyers argued:

> By definition, different representative samples are equivalent to each other. Thus, it does not matter that in order to examine for asbestos under electron microscope, the tissue being sampled has to be destroyed. The fundamental misrepresentation of the defense is that tissue testing can be done once and only once. Even if one considered the evidence to be the tissue *it is not unique because the defense can test its own representative sample*.

(App. Docket No. 95) (emphasis added). Thus, in order to persuade the district court to permit her to conduct unilateral destructive testing, plaintiff argued that lung tissue is uniform;

that it is not unique; and that both sides would receive "representative samples" such that each side could learn what was and was not present by way of mineral content in the lung tissue destroyed by the other side.

So long as plaintiff's lawyers maintained that the lung tissue samples were "not unique" and contended that defendants could learn the mineral content of the tissue which plaintiff had destroyed by reference to the tissue made available to defendants (*i.e.*, that the tissue was uniform or both parties were given representative samples), both parties were able to discover facts on the same subject matter, namely, the mineral content of the lung tissue destroyed. The problem arose, however, when plaintiff's lawyers changed their position and put forward an expert witness who contended that the lung tissue samples were unique. Thus, in order to defeat summary judgment, plaintiff's lawyers submitted the testimony of Dr. Schwartz who testified that even if fiber analysis of the lung tissue had not found any crocidolite fibers, one could *not* come to a conclusion about whether there was crocidolite in the total lung tissue. Dr. Schwartz testified further that "portions of the lung vary in density and, therefore, vary in dry weight, *because lung is not a homogenous tissue*." (Pet. App. at A-19) (emphasis added). Based on this testimony of Dr. Schwartz and the changed position of plaintiff's lawyers regarding the representativeness of the tissue samples, the district court stated:

> [W]e conclude that since portions of the lung vary in density and the lung is not homogeneous tissue, in the instant case, there is a showing of exceptional circumstances. Asbestos is not uniformly disbursed throughout the lung; each sample is unique thereby making each analysis unique.

(Pet. App. at A-19-20.) The court concluded: "Thus, in the instant case, it is impractical both for the party seeking discov-

ery to obtain facts or opinions on the same subject or equivalent information by other means. . . ." (Pet. App. at A-20.) The Seventh Circuit affirmed this finding and ruling by the district court.

The circuit court's opinion succinctly states the essence of this matter. The court points out that plaintiff's lawyers had taken the position, when the question of destructive testing of lung tissue first arose, that "[a]ny asbestos fibers would be uniformly distributed throughout the lung tissues so that tests conducted by the defendants' experts on the sections of tissues that they had received from the autopsy would be tests of a reliable sample of the tissues as a whole." (Pet. App. at A-8.) Subsequently, however, as the circuit court pointed out, "plaintiff's lawyers changed their tune." (*Id.*) They now contended not only that the asbestos was not uniformly distributed but also that there is no such thing as a representative sample of lung tissue. As the circuit court indicated, this "change of position hampered the defense, which could not conduct its own test on tissues that had been destroyed in the course of the plaintiff's tests. The only way the defense could find out whether there were crocidolite asbestos fibers in the tissue that the plaintiff's experts had tested was to get the test results. The condition for the exception of Rule 26(b)(4)(B) thus was satisfied. . . ." (*Id.*) This is a correct and straightforward application of the exceptional circumstances language of Rule 26.

The legal principles which were applied by the circuit court and the district court are well-settled. The finding of exceptional circumstances in this case was particularly fact-bound, had everything to do with the change of position by the plaintiff's lawyers, and was based on the testimony of plaintiff's own expert witness. Obviously, if plaintiff's lawyers had from the beginning told the district court that lung tissue is not uniform, that each sample is unique, and that there is no such thing as a representative sample, the district court would not have permitted the unilateral destruction of the lung tissue by

plaintiff without granting defendants broad access to the same information. The lung tissue was evidence which plaintiff had no right to destroy and then withhold the information learned in destroying that evidence.

A glaring inconsistency in plaintiff's lawyers' argument before this Court is their contention now that "both sides had equal samples of lung tissue." (Pet. at 17.) This is *not* what the plaintiff's lawyers finally contended in the district court where, in opposing summary judgment, they said that one could not tell from examining a sample of the tissue what was and was not present in other portions of the lung tissue. (App. Docket No. 194.) Moreover, plaintiff's statement that the Seventh Circuit's ruling "means that air samples, groundwater samples, soil samples, market research samples and other sampling would all be deemed to be exceptional circumstances," (Pet. at A-17), is simply inaccurate. It misstates the holding of the circuit court and the significance of this particular case. So long as samples provided to both parties for testing are uniform or representative (and the parties agree on this), then unilateral destructive testing is appropriate. If both parties have uniform or representative samples, exceptional circumstances do not exist because the parties have access to the same information. If, however, each sample is necessarily unique (or if the party seeking to hide the test results puts forward an expert witness who contends that each sample is unique), then each analysis is unique. If the analysis requires destructive testing which cannot be repeated, the party who does not have that material cannot, in the words of Rule 26, "obtain facts or opinions on the same subject matter by other means." Fed. R. Civ. P. 26(b)(4)(B). Exceptional circumstances would therefore exist to permit disclosure of the destructive testing results under Rule 26.

As the courts below held, it was impossible for defendants to determine whether the tissue tested by plaintiff's experts contained crocidolite asbestos. Because the parties were not

allocated representative samples of the decedent's lung tissue, the district court properly ordered plaintiff to disclose the results of her experts' destructive testing.

## II. The Seventh Circuit Based Its Decision Affirming the District Court's Exclusion of Dr. Schwartz's Testimony Upon a Proper Application of *Daubert*.

Plaintiff contends that Chief Judge Posner does not understand, and has written an opinion which conflicts with, this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993). *Daubert* instructs district courts to make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts at issue." *Id.* at 592-93. Under *Daubert*, "the trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Id.* at 589. A scientific expert's testimony is reliable only if it has a "basis in the knowledge and experience of his discipline." *Id.* at 592. As this Court explained:

> [I]n order to qualify as "scientific knowledge," an inference or assertion must be derived by the scientific method. Proposed testimony must be support by appropriate validation — i.e., "good grounds," based on what is known. In short, the requirement that an expert's testimony pertain to "scientific knowledge" establishes a standard of evidentiary reliability.

*Id.* at 590 (footnote omitted). In the decision below, the Seventh Circuit upheld the district court's conclusion that Dr. Schwartz's testimony amounted to mere speculation lacking

the authority of science based upon two findings: (1) that Dr. Schwartz had no knowledge pertaining to fiber burden analysis of lung tissue, and (2) that Dr. Schwartz did not follow the scientific method. The district court's decision excluding Dr. Schwartz's unscientific speculation and the circuit court's affirmance of the same, fully comport with the framework established by this Court in *Daubert*, and does not conflict with the other decisions cited by plaintiff.

A. *The Seventh Circuit Appropriately Ruled On The Scientific Validity Of The Principles And Methodology Underlying Dr. Schwartz's Opinion.*

Plaintiff bases the asserted conflict with *Daubert* on a fundamental misunderstanding of this Court's decision in that case. Plaintiff argues that "the Seventh Circuit misapplied *Daubert* and created a standard by which courts reject scientific testimony because they are not satisfied with it." (Pet. at 21.) This, however, is precisely the holding of *Daubert* under which federal judges perform a "gatekeeping role" by screening out unreliable scientific testimony. *Daubert*, 509 U.S. at 597. *Daubert* commands district courts to determine as a threshold matter "whether the experts' testimony reflects 'scientific knowledge,' whether their findings are 'derived by the scientific method,' and whether their work product amounts to 'good science.'" *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1315 (9th Cir.) (on remand) (citing *Daubert*, 113 S.Ct. at 2795, 2797), *cert. denied*, ___ U.S. ___, 116 S. Ct. 189, 133 L.Ed.2d 126 (1995). Thus, the claimed conflict with *Daubert* does not exist.

1. The Seventh Circuit Limited Its Decision Solely To Whether Dr. Schwartz's Opinion Pertained To Scientific Knowledge.

With no citation to the Seventh Circuit's opinion, plaintiff implicitly claims that the court improperly ruled on the validity

of Dr. Schwartz's conclusions. (Pet. at 19-20.) In deciding on the admissibility of an expert witness' opinion, federal judges should focus "solely on principles and methodology, not on the conclusions that they generate." *Daubert*, 509 U.S. at 595. The Seventh Circuit explicitly did not pronounce upon the accuracy of Dr. Schwartz's opinion; indeed, it said: "A judge or jury is not equipped to evaluate scientific innovations." (Pet. App. at A-6.) Instead, the court properly limited its analysis to the scientific validity of the principles underlying Dr. Schwartz's testimony:

> If, therefore, an expert proposes to depart from the generally accepted methodology of his field and embark upon a sea of scientific uncertainty, the court may appropriately insist that he ground his departure in demonstrable and scrupulous adherence to the scientist's creed of meticulous and objective inquiry.

(*Id.*). *See Joiner* v. *General Elec. Co.*, 78 F.3d 524, 530 (11th Cir. 1996)(same), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 5, 1996)(No. 96-188). The Seventh Circuit's decision was thus a direct application of *Daubert*. *See Daubert*, 509 U.S. at 594-95.

2. The Seventh Circuit Properly Affirmed The Exclusion of Dr. Schwartz's Opinion That Crocidolite Asbestos Was Present In Mr. Braun's Lung Tissue.

The asserted conflict with *Daubert* is a thinly veiled attempt by plaintiff to have this Court review the factual underpinning of the Seventh Circuit's decision. The decision whether to admit or exclude expert testimony upon a proper interpretation of *Daubert* is accorded great deference on appeal. *Bradley* v. *Brown*, 42 F.3d 434, 436-37 (7th Cir. 1994). The district court's finding that Dr. Schwartz's testimony did not pertain to scientific knowledge is amply supported by the record.

As the Seventh Circuit found, this case involves an abuse of the litigation process by a disappointed plaintiff.

> The fact that the plaintiff's lawyer turned to this nonexpert, having already consulted experts without obtaining useful evidence, is suggestive of the abuse, or one of the abuses, at which *Daubert* and its sequelae are aimed. That abuse is the hiring of reputable scientists, impressively credentialed, to testify for a fee to propositions that they have not arrived at through the methods that they use when they are doing their regular professional work rather than being paid to give an opinion helpful to one side in a lawsuit.

(Pet. App. at A-7.) Before approaching Dr. Schwartz, plaintiff's lawyers hired recognized experts in the detection of asbestos in tissue. (Pet. App. at A-3.) Those experts conducted fiber burden analysis testing of plaintiff's tissue samples using standard methods for lung tissue digestion and found no crocidolite asbestos. (*Id.*) After receiving the adverse test results, plaintiff's lawyers did not ask these experts to repeat their analysis. Instead, they turned to Dr. Schwartz, the president of a consulting firm that does environmental testing of building materials.

Plaintiff's lawyers specifically requested that Dr. Schwartz conduct fiber burden testing on Mr. Braun's lung tissue *without* using a routine methodology. (Tr. 1053.) The generally accepted methods for digesting lung tissue are bleach digestion and low temperature plasma ashing. (Tr. 2615, 2729, 2736.) Dr. Schwartz complied with the lawyers' wishes and directed his assistant to subject Mr. Braun's tissue to "high temperature ashing," a procedure that his laboratory uses with bulk samples of building materials. Plaintiff presented no evidence that anyone had ever conducted fiber burden analysis of human or animal tissue using this methodology. Dr. Schwartz was aware

that this technique could alter the chemistry of any fibers found in a tissue sample which would therefore make a chemical analysis inconclusive. (Tr. 1055.)

Because Dr. Schwartz did not possess any knowledge or experience pertaining to fiber burden analysis of lung tissue, he could not competently testify that his novel use of the high temperature ashing methodology had a valid scientific basis. Neither Dr. Schwartz nor his assistant who actually tested Mr. Braun's lung tissue had ever conducted fiber burden analysis of human or animal tissue. (Tr. 1051.) Dr. Schwartz's solitary jaunt into the field of fiber burden analysis of lung tissue was thus made solely for the purpose of testifying for plaintiff at trial. (Tr. 1016-17.) Federal judges may properly consider whether experts propose "to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they developed their opinions expressly for purposes of testifying," *Daubert*, 43 F.3d at 1317, in determining whether the proffered testimony constitutes "scientific knowledge" under *Daubert*. *Id.*

Moreover, Dr. Schwartz had no familiarity whatsoever with fiber burden analysis of lung tissue. Dr. Schwartz admitted that he could not identify the standard methods for preparing lung tissue for fiber burden analysis. (Tr. 1065-66.) Indeed, he did not know whether or not high temperature ashing is a customary technique utilized by experts who, in fact, do fiber burden analysis of lung tissue. (Tr. 1066.) Dr. Schwartz further admitted that he was unable to identify any authorities who have published procedures for this specialized process. (Tr. 1021.) He could not name any scientific literature related to lung tissue testing. (*Id.*) Dr. Schwartz made no effort to look to any resource to educate himself and to prepare the protocol for his laboratory's analysis of Mr. Braun's lung tissue. (Tr. 1052.)

Despite his admitted and complete lack of experience and knowledge, Dr. Schwartz did not bother to familiarize himself

with, let alone evaluate, the standard methods for conducting fiber burden analysis of lung tissue. (Tr. 1065-66.) He did not confer with anyone who had knowledge of or experience with fiber burden analysis of tissue. (Tr. 1052.) Indeed, Dr. Schwartz never even inquired "why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method." (Pet. App. at A-6.)

The district court therefore correctly held that Dr. Schwartz lacked the requisite knowledge or experience to testify that Mr. Braun's lung tissue contained crocidolite asbestos:

> [Dr. Schwartz] also testified that he really didn't have any knowledge of the methodology that should be employed, and he still doesn't have any information regarding the methodology that should be employed with respect to lung tissue. It seems to me that this witness knows absolutely nothing about analyzing lung tissue and [for?] asbestos fibers.

(Tr. 1073.) The Seventh Circuit affirmed the district court's decision, holding that Dr. Schwartz's testimony was not derived by the scientific method:

> Consider: A litigant's lawyers approach a scientist and tell him that the accepted methods of testing for asbestos fibers in human tissues have come up negative. They ask him to use a different method and he without pause offers to use one that is designed for use on building materials and has never been used on human or animal tissues. Not even knowing what the accepted methods of testing for the presence of asbestos in tissue are, let alone ever having conducted such a test, the scientist agrees to perform the test by his method, using a lab assistant (which is fine) but relying on the lab assistant's purely oral report,

> which is not fine given the novelty of the procedure. He speculates that his method is perfectly transferable from building materials to human tissues. Since he has never done any testing of those tissues, his speculations lack the authority of science. These are the symptoms of forensic science, an oxymoron.

(Pet. App. at A-6-7.) Dr. Schwartz's opinion that Mr. Braun's lung tissue contained crocidolite asbestos therefore amounted to mere speculation and was properly excluded under *Daubert*.

B. *The Seventh Circuit Properly Affirmed The Exclusion Of Dr. Schwartz's Unsupported Speculation Where Plaintiff Presented No Evidence That The Methodology Employed By Dr. Schwartz Was Scientifically Reliable.*

Plaintiff next asserts that the Seventh Circuit's decision conflicts with this Court's observation in *Daubert* that in performing its "gatekeeping" role, the district court should consider whether the theory or technique utilized by the scientific witness is capable of being refuted. (Pet. at 21-22.) Under *Daubert*, "[o]rdinarily, a key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be *(and has been)* tested." *Daubert*, 509 U.S. at 593 (emphasis added). Plaintiff failed to present any evidence that subjecting lung tissue to high temperature ashing had in fact been tested. "Nor, so far as appears, has high temperature ashing ever been used by anyone else to test for the presence of asbestos fibers in tissue." (Pet. App.at A-3.) It is well-settled that it was plaintiff's burden to lay a foundation for Dr. Schwartz's testimony. *United States* v. *Williams*, 95 F.3d 723, 1996 WL 517415, *6 (8th Cir. Sept. 13, 1996); *see American & Foreign Ins. Co.* v. *General Elec. Co.*, 45 F.3d 135, 139 (6th Cir. 1995) ("the burden is on plaintiffs to persuade this court that the

testing was reliable and supported by raw data"); *Daubert*, 43 F.3d at 1316 ("the party presenting the expert must show that the expert's findings are based on sound science"). There is no basis for plaintiff's attempt to recast its failure to meet its burden of proof at trial as a misapplication of *Daubert* by the Seventh Circuit.

Accordingly, the asserted conflict with the Sixth Circuit's decision in *United States* v. *Bonds*, 12 F.3d 540 (6th Cir. 1993), does not exist. There, the Sixth Circuit held that the district court properly admitted the FBI's proffered expert testimony regarding DNA testing results because the test results "were clearly derived from tests based on methods and procedures of science and not based merely on speculation, and were supported by sound and cogent reasoning." *Id.* at 565-66. The Sixth Circuit did not adopt plaintiff's "refutability" evidentiary standard. Rather, the Sixth Circuit found that the principles and methodology employed by the FBI had in fact been tested. *Id.* at 558. Unlike the instant action, the defendants in *Bonds* did not object to the general principles or methodology underlying the expert testimony. *Id.* at 557-58. Instead, the defendants challenged only the accuracy of the FBI's testing results. *Id.* at 558. The circumstances presented in *Bonds* are therefore entirely dissimilar to this case in which the excluded testimony was based upon a methodology which had not been tested or otherwise shown to be scientifically reliable.

### C. *Because Dr. Schwartz Had No Knowledge Or Experience Pertaining To Fiber Burden Analysis of Lung Tissue, The Seventh Circuit Was Not Required To Credit His Unverified Assurance That The Novel Technique He Employed Was Scientifically Valid.*

Plaintiff argues that the Seventh Circuit was bound by Dr. Schwartz's assertion that using high temperature ashing on Mr. Braun's lung tissue was scientifically valid because it

would not result in a "false positive" for the presence of crocidolite asbestos in the tissue. (Pet. at 23.) "Yet something doesn't become 'scientific knowledge' just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were 'derived by the scientific method' be deemed conclusive." *Daubert*, 43 F.3d at 1316. *See Joiner*, 78 F.3d at 529; *Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996) ("an expert who supplies nothing but the bottom line supplies nothing of value to the judicial process"), *cert. denied*, 64 U.S.L.W. 3839 (U.S. Oct. 7, 1996) (No. 95-1986). "Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology." *Daubert*, 43 F.3d at 1316.

Plaintiff presented no evidence indicating that Dr. Schwartz's bald assertion that high temperature ashing could not result in a "false positive" had a "reliable basis in the knowledge and experience of his discipline." *Daubert*, 509 U.S. at 592. In fact, contrary to Dr. Schwartz's contention, the evidence demonstrated that this method could produce a "false positive." Dr. Schwartz acknowledged the possibility that his method could alter the chemistry of any minerals found in a given tissue sample. (Tr. 1055.) The altered chemistry could in turn alter the spectrographic profile (or appearance) of any fibers found so that a mineral could be falsely identified as crocidolite asbestos. (Pet. App. at A-4.) Other evidence tended to contradict the suggestion that Dr. Schwartz's technique could not result in a "false positive." For example, of forty tissue examinations conducted by four different laboratories, only one purported to find crocidolite asbestos. In addition, all samples tested by the three laboratories with experience in fiber burden analysis and which used the recognized sample preparation techniques contained *no* crocidolite asbestos. Dr. Schwartz's laboratory did not even attempt to replicate his assistant's "finding" of crocidolite. He simply said that his assistant found

crocidolite in one of eight samples and then baldly asserted that his untested, unverified technique which admittedly could produce an inconclusive analysis should be considered infallible. Neither the district court nor the Seventh Circuit was required to credit Dr. Schwartz's testimony which amounted to at best mere "unscientific speculation offered by a genuine scientist." *Rosen*, 78 F.3d at 318.

D. *The Seventh Circuit Required Dr. Schwartz To Derive His Testimony From The Scientific Method, And Did Not Merely Require Experimental Data Supporting His Conclusion.*

Based solely upon a selective presentation of the opinion below, plaintiff further alleges that the Seventh Circuit found that Dr. Schwartz's opinion was mere speculation simply because "he has never done any testing of those tissues."[1] (Pet. at 24.) As discussed above, the Seventh Circuit affirmed the exclusion of Dr. Schwartz's opinion because Dr. Schwartz's reasoning and methodology were not derived by the scientific method. (Pet. App. at A-7.) This is a direct application of *Daubert* and does not conflict with the cases cited by plaintiff, *Joiner* v. *General Electric Co.*, 78 F.3d 524 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3110 (U.S. Aug. 5, 1996) (No. 96-188), and *Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996), *cert. denied*, 64 U.S.L.W. 3839 (U.S. Oct. 7, 1996) (No. 95-1986).

In *Joiner*, the Eleventh Circuit reversed the district court's decision excluding plaintiff's experts' testimony, holding that

[1] The Seventh Circuit criticized the plaintiff's lawyers' selective presentation of the record: "The plaintiff's lawyers committed a serious violation of 7th Cir. R. 30(c) by falsely certifying that all materials required by Rule 30 to be included in the appellant's appendix had been included, while leaving out the part of the trial transcript that contains the principal ground for Judge Manning's ruling that Dr. Schwartz could not give an opinion on the presence of asbestos fibers in Braun's lung tissues." (Pet. at A-5.)

the district court failed to limit its inquiry to whether the bases supporting the experts' conclusions were reliable and instead substituted its own independent scientific judgment that the experts' opinions were incorrect. *Joiner*, 78 F.3d at 532-34. Unlike the instant action, the general acceptance of the methods and procedures was not contested. *Id.* at 532. Moreover, the plaintiff's experts each had extensive experience and specialized expertise in the scientific field about which they sought to testify. *Id.* at 532. In this case, the Seventh Circuit focused solely on the principles and methodology underlying Dr. Schwartz's testimony. Consistent with *Daubert* and the Eleventh Circuit's ruling in *Joiner*, the Seventh Circuit properly guarded "the jury from considering as proof pure speculation presented in the guise of legitimately-based expert opinion." *Id.* at 530.

The asserted conflict with the Seventh Circuit's own decision in *Rosen* v. *Ciba-Geigy Corp.*, 78 F.3d 316 (7th Cir. 1996), is especially peculiar. Normally, an internal conflict between two decisions from the same circuit does not warrant this Court's review. Moreover, the opinion in *Rosen* was also written by Chief Judge Posner and decided just two months before the instant action. In fact, there is no conflict. The Seventh Circuit's decision in *Rosen* anticipated its decision in this case:

> Under the regime of *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L.Ed.2d 469 (1993), a district judge asked to admit scientific evidence must determine whether the evidence is genuinely scientific, as distinct from being unscientific speculation offered by a genuine scientist.

*Rosen*, 78 F.3d at 318. Plaintiff's reliance upon Chief Judge Posner's identical analysis in *Rosen* demonstrates that plaintiff's actual grievance lies only with the factual determinations underlying the proper application of *Daubert* in this case.

E. *The "General Acceptance" Standard Applied By The Seventh Circuit Does Not Conflict With The Sixth Circuit Where Plaintiff Presented No Evidence Either That High Temperature Ashing Had Previously Been Used With Human Lung Tissue Or That Anyone In The Scientific Community Approved Of This Technique.*

Plaintiff contends that the Seventh Circuit's decision also conflicts with the Sixth Circuit's decision in *United States* v. *Bonds*, 12 F.3d 540 (6th Cir. 1993), on the meaning of "general acceptance" under *Daubert*. In *Bonds*, the Sixth Circuit held that "[o]nly when a theory or procedure does not have the acceptance of most of the pertinent scientific community, and in fact a substantial part of the scientific community disfavors the principle or procedure, will it not be generally accepted." *Id.* at 562. Plaintiff incorrectly claims that the Seventh Circuit concluded that the methodology employed by Dr. Schwartz was not generally accepted in the scientific community based upon Dr. Schwartz's lack of knowledge of the preferred method for digesting lung tissue. (Pet. at 27.)

To the contrary, the Seventh Circuit correctly found that the generally accepted methods for fiber burden analysis of lung tissue are bleach digestion and low temperature plasma ashing. (Pet. App. A-3) (*See* Tr. 2615, 2729, 2736.) Dr. Pooley, who has conducted fiber burden analysis of lung tissue for thirty years, testified that he is only aware of digestion methods using bleach or other solvents or low temperature plasma ashing. (Tr. 2729.) Likewise, the circuit court observed: "The plaintiff's lawyers had hired recognized experts in the detection of asbestos in tissue, and those experts had conducted tests of tissue from Braun's lungs using the standard methods, and had found nothing." (Pet. at A-3.) Plaintiff presented no evidence at trial that anyone other than Dr. Schwartz has ever conducted fiber burden analysis of human or animal

tissue using high temperature ashing.[2] Federal judges may properly view with skepticism the use by a proposed expert of "'a known technique that has been able to attract only minimal support within the community.'" *Daubert*, 509 U.S. at 594 (citation omitted). In the words of the Seventh Circuit, "[t]o forsake the accepted methods without even inquiring *why* they are the accepted methods — in this case, why specialists in testing human tissues for asbestos fibers have never used the familiar high temperature ashing method — and without even knowing *what* the accepted methods are, strikes us, as it struck Judge Manning, as irresponsible." (Pet. at A-6.) Therefore, the "general acceptance" standard applied by the Seventh Circuit is consistent with this Court's decision in *Daubert* and does not conflict with the standard enunciated by the Sixth Circuit in *Bonds*.

The Seventh Circuit's decision thus comports with *Daubert* in all respects. The asserted conflict with *Daubert* masks plaintiff's true contention, namely, that the courts below misapplied settled law to the particular facts of this case. The exclusion of Dr. Schwartz's speculation that Mr. Braun's lung tissue contained crocidolite asbestos was properly decided and does not merit further review by this Court.

## III. The Seventh Circuit Correctly Held That the District Court Cured Any Impression Conveyed By Defendants on Cross Examination of Dr. Cugell That Dr. Churg Believed That the Kent Filter Could Not Cause Mesothelioma.

In Question III of the Petition, plaintiff contends that the Seventh Circuit erroneously held that the district court committed harmless error by refusing to permit plaintiff's expert, Dr. Cugell, to testify on redirect examination that he relied on Dr.

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[2] Plaintiff incorrectly argues in her Statement of the Case that high temperature ashing is a generally accepted method for conducting fiber burden analysis. (Pet. at 8.)

Andrew Churg's opinion that Kent cigarettes with the asbestos-containing filter could cause mesothelioma. (Pet. at 28-30.) However, while the Seventh Circuit held that the district court's error was harmless, the court alternatively held that the district court properly limited plaintiff's rebuttal of defendants' allegedly misleading cross examination by allowing Dr. Cugell to testify on redirect that he based his opinion in part on statements made by Dr. Churg. (Pet. App. at 13-14.) The Seventh Circuit concluded that "[t]o permit Dr. Cugell to have repeated Churg's testimony might well have been overkill, without a collateral inquiry, which might have confused the jury and would certainly have protracted the trial, into the scientific basis of that testimony." (Pet. App. at A-14.) In light of this alternative holding, this Court should not reach the question presented by plaintiff.

Moreover, the Seventh Circuit correctly held in the alternative that any error committed by the district court was harmless. A trial court's error requires reversal only if it "had substantial and injurious effect or influence in determining the jury's verdict." *Kotteakos* v. *United States*, 328 U.S. 750, 776, 66 S. Ct. 1239, 90 L.Ed. 1557 (1946). It cannot reasonably be said that in the course of a complex three-week trial, the district court's refusal to permit Dr. Cugell to recite the precise statement made by Dr. Churg in a prior lawsuit substantially influenced the jury's verdict for defendants. Moreover, as the Seventh Circuit concluded, the district court cured any prejudice to plaintiff by permitting Dr. Cugell to testify on redirect that he relied in part on statements by Dr. Churg. (Pet. App. at A-13-14.) *See United States* v. *Martinez*, 988 F.2d 685, 702 (7th Cir.) ("inadmissible evidence is permitted only to the extent necessary to remove any unfair prejudice which might otherwise have ensued from the original evidence"), *cert. denied*, *Noel* v. *United States*, 510 U.S. 841, 114 S. Ct. 125, 126 L.Ed.2d 91 (1993). Because the jury was apprised of the general agreement between the two experts, strict recitation

by Dr. Cugell of Dr. Churg's opinion testimony was unnecessary. (Pet. App. at A-14.) In fact, plaintiff concedes that at a minimum, the redirect examination allowed by the district court dispelled any impression allegedly left by defendants' cross examination that Dr. Churg did not believe that smoking Kent cigarettes with the asbestos-containing filter could cause mesothelioma. (Pet. at 29) ("All that the redirect could have done was to make the jurors wonder what Churg had really said.")

This Court only sparingly reviews cases to evaluate a harmless error claim. *United States* v. *Lane*, 474 U.S. 438, 450, 106 S. Ct. 725, 88 L.Ed.2d 814 (1986); *United States* v. *Hastings*, 461 U.S. 499, 510, 103 S. Ct. 1974, 76 L.Ed.2d 96 (1983). There is no indication in the instant case that the district court's refusal to permit Dr. Cugell to repeat the actual statement made by Dr. Churg on which he allegedly relied substantially influenced the jury's verdict. *See Kotteakos*, 328 U.S. at 776. In the absence of prejudice to plaintiff, there is no basis for further review by this Court.

## CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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HOLLINGSWORTH & VOSE COMPANY'S APPENDIX

**Excerpt from the Transcript of Proceedings in the United States District Court for the Northern District of Illinois, Eastern Division on March 16, 1995**

* * *

THE CLERK: 94 C 976, Braun versus Lorillard.

MR. SCHOENFIELD: Good morning, Your Honor. Rick Schoenfield on behalf of plaintiffs.

THE COURT: Mr. Schoenfield.

MR. EVANS: Good morning, Your Honor.

THE COURT: Good morning.

MR. EVANS: Mark Evans on behalf of Lorillard.

MR. DOUGHERTY: George Dougherty also on behalf of Lorillard.

MR. MCELANEY: Good morning, Your Honor. Andrew McElaney on behalf of Hollingsworth & Vose.

THE COURT: All right. This is defendants' motion today?

MR. EVANS: Yes. Defendants Lorillard and Hollingsworth & Vose filed a motion to stay destructive testing of evidence and to request additional information on exactly what the tests would involve. We were notified on March 7th by Mr. Schoenfield that he intended to conduct testing on the lung tissue that was removed from Mr. Braun after his death. That day, Mr. Dougherty contacted Mr. Schoenfield and requested that he stay any testing and provide us with some information about exactly what type of test was being planned.

Mr. Schoenfield, in correspondence and also, I believe, by telephone, refused to do so, so we filed a motion to stay the testing with the Court. Essentially what we're asking for is to require Mr. Schoenfield to stay the test and provide us with information about exactly what it is he plans to do to the lung tissue so that we can make an appropriate determination of how we want to respond to that.

THE COURT: Mr. Schoenfield?

MR. SCHOENFIELD: All right. I did file a written response yesterday.

THE COURT: I've read it.

MR. SCHOENFIELD: I told — I stated in open court about a week or so ago that half or more of the tissue would be preserved unless we give prior notice to the contrary. We have not given any such prior notice, and I don't expect to. One [lung?] tissue, as far as I know, is lung tissue. We're saving half of it in the event the defense wished to seek to do anything with it. Therefore, this is not a situation where the issue is a tire blew out on a car and we got one tire. When you do something with that tire, that's it. That's not the case that we have here.

This is analogous to having a bunch of blood samples and potentially having each side test half of the samples if they wish to do so. There is no harm to the defendants, and they have no right to find out what we might do with a consultant under these circumstances.

* * *